United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2037

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------X

UNITED JEWISH ORGANIZATIONS OF WILLIAMSBURGH, INC., et al.,

Plaintiffs-Appellants,

-against-

MALCOLM WILSON, et al.,

Defendants-Appellees.

----------X

No. 74-2037

BRIEF FOR APPELLEES
MALCOLM WILSON, JOHN
GHEZZI, WARREN ANDERSON
AND PERRY DURYEA, JR.

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Appellees
Wilson, Ghezzi, Anderson
and Duryea
Two World Trade Center
New York, N.Y. 10047
(212) 488-7413

GEORGE D. ZUCKERMAN
Assistant Attorney General,
Of Counsel.

2

TABLE OF CONTENTS

TABLE OF CASES

Cases — Page

Statutes

Statutes — Page

Miscellaneous

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------X

UNITED JEWISH ORGANIZATIONS OF WILLIAMSBURGH, INC., et al.,

Plaintiffs-Appellants,

-against-

MALCOLM WILSON, et al.,

Defendants-Appellees.

No. 74-2037

----------X

BRIEF FOR APPELLEES
MALCOLM WILSON, JOHN
GHEZZI, WARREN ANDERSON
AND PERRY DURYEA, JR.

Question Presented

Did the enactment of Chapters 588, 589, 590, 591 and 599 of the New York Laws of 1974, insofar as they altered assembly and senate district lines in the area commonly known as Williamsburgh in Kings County to satisfy objections expressed by the Attorney General of the United States to the prior district lines pursuant to § 5 of the Voting Rights Act of 1965, as amended, violate appellants' rights under the Fourteenth and Fifteenth Amendments?

Statement

I. Introduction

Plaintiffs allege to be registered voters and adherents of the Orthodox Jewish faith and members of the Hasidic community located in Williamsburgh in Kings County, New York. The complaint asserts that the Hasidic community in Williamsburgh has for the past twenty-five years been included within one State senate district and one State assembly district (Comp., para. 8). Under the 1972 reapportionment (Chapter 11 of the Laws of 1972), the Hasidic community of Williamsburgh was included within the 57th State Assembly District and the 17th State Senate District.

On April 1, 1974, the Attorney General of the United States, who has been named as a defendant in this action, acting through Assistant Attorney General J. Stanley Pottinger, issued a determination stating that the assembly and senate district lines in Kings County established by Chapter 11 of the Laws of 1972 as well as the congressional district lines in Kings County established by Chapters 76, 77 and 78 of the New York Laws of 1972 were invalid under § 5 of the Voting Rights Act because the purportedly over concentration of non-whites in certain districts were considered by the United States Attorney General to produce a racially discriminatory effect. A copy of the Pottinger

ruling of April 1, 1974 is annexed to the complaint as Exhibit "VI". The effect of the United States Attorney General's determination of April 1, 1974 under § 5 of the Voting Rights Act was to preclude the use of the district lines that were not approved by the Attorney General.

To satisfy the demands of the United States Attorney General, the New York State Legislature on May 29 and 30, 1974 redrew the assembly, senate and congressional district lines in Kings County. Laws of 1974, Chapters 588, 589, 590, 591 and 599.

Plaintiffs contend that in enacting the 1974 redistricting statutes, the State of New York violated plaintiffs' rights purportedly secured by the Equal Protection and Due Process Clauses of the Fourteenth Amendment by dividing the Williamsburgh Hasidic community into two assembly districts (the 56th and 57th) and into two senate districts (the 23rd and 25th) since such divisions were allegedly only made necessary by the race conscious standards imposed by the United States Department of Justice.

II. Background

Sections 4 and 5 of the Federal Voting Rights Act of 1965, as amended in 1970, 42 U.S.C. §§ 1973b, 1973c, provide

that in any state or political subdivision thereof which utilizes a test as a precondition for voting and in which less than 50% of persons of voting age voted in the 1968 Presidential Election, any changes in voting laws or procedures (including reapportionment plans) enacted since November 1, 1968 may not take effect until they have been approved by either the Attorney General of the United States or by the District Court in the District of Columbia.

On March 27, 1971, the United States Bureau of the Census determined that the Counties of The Bronx, Kings and New York were subject to the above provisions of the Voting Rights Act since a literacy test was used in those counties prior to 1970 as a precondition to voting and since less than 50% of the persons of voting age residing in those counties voted in the Presidential Election of 1968.

The Voting Rights Act permits a state or county that has become subject to its provisions to be exempted from the filing requirements of the Act by obtaining a declaratory judgment in the District Court for the District of Columbia adjudging that neither the purpose or effect of any test employed as a precondition for voting in the affected area was to deny or abridge any citizen's right to vote on account of race or color. The State of New York brought such an

action on behalf of The Bronx, New York and Kings Counties in December, 1971. After a four-month investigation into election procedures in the three affected counties, the Justice Department consented to the entry of the declaratory judgment sought by the State of New York and the District Court on April 13, 1972 issued an order granting the State's motion for summary judgment exempting the three affected counties from the filing requirements of the Voting Rights Act. New York State v. United States, D.D.C. Civil Action No. 2419-71 (unreported).

In October, 1973, the Justice Department moved to reopen the declaratory judgment granted to the three affected counties on the ground that a decision by District Judge Charles E. Stewart in the Southern District of New York in the case of Torres v. Sachs, 73 Civ. 3921, had held that the failure of the New York City Board of Elections to provide a Spanish translation of the ballot violated the rights of Spanish-speaking citizens living in New York City in contravention of the Federal Voting Rights Act of 1965, as amended.

The Justice Department's motion to reopen was granted by the District Court which on January 10, 1974 entered an order rescinding the previous declaratory judgment that had

been granted to the State of New York and directed the State, on behalf of the three affected counties to comply with the filing requirements of § 5 of the Voting Rights Act. An application for a stay of that order was denied by the District Court and by the Supreme Court of the United States. Subsequently, on April 30, 1974, the District Court denied the motion of the State for summary judgment and entered a judgment dismissing the action for declaratory judgment.

The effect of the above proceedings has been to require the submission by the State of all voting laws and procedures, including reapportionment plans, that have been enacted since November 1, 1968, to the Department of Justice insofar as they involve the Counties of The Bronx, Kings and New York. On April 1, 1974 the Department of Justice issued a determination in which they approved fifty-one statutes involving changes in voting procedures, but refused to approve changes in certain assembly and State senate district lines in Kings and New York Counties and congressional district lines in Kings County on the grounds that while the purpose of those district lines might not have been to discriminate, the district lines had a racially discriminatory effect.

Under the provisions of § 5 of the Voting Rights Act, the Justice Department's ruling of April 1, 1974 prevented any election from taking place in Kings and New York Counties under the district lines that were not approved by the Attorney General of the United States.

While neither the State defendants nor the Joint Legislative Committee on Reapportionment subscribed to the ruling of the Justice Department as expressed in the April 1, 1974 letter of Assistant Attorney General J. Stanley Pottinger, the exigencies of time required that new legislation be enacted immediately to satisfy the objections of the Department of Justice and thereby permit an orderly primary and general election to take place in New York and Kings Counties in 1974. Accordingly, the Joint Legislative Committee on Reapportionment prepared for introduction to the New York State Legislature a series of bills at a special session which were enacted on May 29 and 30, 1974 to redraw the assembly, State senate and congressional lines in Kings County and the assembly and senate lines in New York County in an effort to satisfy the demands of the United States Department of Justice. Laws of 1974, Chapters 588, 589, 590, 591 and 599. These laws were submitted by the State of New York to the Department of Justice on May 31, 1974. By letter dated July 1, 1974 from

Assistant United States Attorney General J. Stanley Pottinger to Assistant State Attorney General George D. Zuckerman, the Department of Justice announced that the Attorney General of the United States did not interpose any objection to the implementation of the above submitted laws. See Tab. 16 of the Appendix, Volume II.

III. Proceedings Below

On June 17, 1974, a hearing was held in connection with plaintiffs' motion for a temporary restraining order. Plaintiffs' motion was denied, but the parties agreed to accelerate this proceeding in light of the pending election timetable. Accordingly, on June 20, 1974 a full hearing was held in connection with plaintiffs' motions for a preliminary injunction and for summary judgment and the motion of the United States to dismiss the complaint for failure to state a claim for which relief can be granted and for lack of jurisdiction.

On July 25, 1974, District Judge Bruchhausen filed his opinion and order denying the plaintiffs' motions for a preliminary injunction and summary judgment and granting the motion to dismiss the complaint. The opinion of the District Court held that in view of the approval of the 1974

lines by the Attorney General of the United States, plaintiffs' cause of action insofar as it might be based on the Voting Rights Act of 1965 must be dismissed. The allegations by plaintiffs of a violation of their rights under the Fourteenth and Fifteenth Amendments were also held by the District Court to be untenable. The Court pointed out that there was no constitutional right for members of a community to be protected against the division of their community in the drawing of district lines. The Court also pointed out that it was well settled that even if the Legislature had employed racial considerations in the drawing of the 1974 lines, such considerations were not constitutionally precluded where they were undertaken "to correct a wrong".

ARGUMENT

THE COURT BELOW CORRECTLY DISMISSED THE COMPLAINT SINCE APPELLANTS FAILED TO ESTABLISH ANY CONSTITUTIONAL OR STATUTORY DEPRIVATION OF THEIR RIGHTS WHICH WOULD ENTITLE THEM TO INJUNCTIVE RELIEF.

A.

The thrust of plaintiffs' complaint is that the members of the Hasidic community in Williamsburgh, as a "closely knit" community with close cultural and religious ties, should not have been divided into separate assembly and State senate districts by the challenged 1974 State statutes.

In examining plaintiffs' contention, it must be recognized at the outset that there is no constitutional or federal statutory requirement prohibiting a state from drawing legislative or congressional district lines which cut across city and county borders. A fortiori there is no constitutional prohibition prohibiting the division of so-called "community" lines.

The exact number of communities in Kings County has been the subject of dispute among historians, political

scientists, sociologists and real estate salesmen.* Plaintiffs' witness, Councilman Frederick W. Richmond testified that there were "50 or 60 clearly-defined communities in the County of Kings." Transcript of hearing of June 20, 1974, p. 15. It is obvious that each of these fifty or more communities which vary considerably in population could not be treated as separate entities in the establishment of 8.6 senate districts or 21.4 assembly districts that Kings County was entitled to by virtue of its population and still satisfy the overriding constitutional requirement that legislative districts must be equal in population. See Reynolds v. Sims, 377 U.S. 533 (1964); WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964).

* In 1959, the Community Council of Greater New York in their two-volume study entitled "Population Characteristics" divided Brooklyn into the following communities: Greenpoint, Williamsburgh, Bushwick-Ridgewood, Brooklyn Heights-Fort Greene, Bedford-Stuyvesant, Crown Heights, Brownsville, East New York, South Brooklyn-Redhook, Park Slope, Sunset Park-Gowanus, Bay Ridge, Boro Park-Kensington, Bensonhurst, Gravesend, Coney Island, Flatbush-East Flatbush, Canarsie, Midwood-Flatlands, and Sheepshead Bay.

In addition to the federal constitutional requirement that districts be substantially equal in population, the New York State Constitution requires that in the formation of State legislative districts, "blocks which, from their location, may be included in either of two districts, shall be so placed as to make said districts most nearly equal in number of inhabitants." N.Y.S. Const., Art. III, §§ 4, 5. In applying this so-called "block on the border" constitutional requirement, the 1974 redistricting statutes in Kings County created seven new assembly districts which each have the population of 120,768 while the new senate districts created in Kings County do not vary by more than one person in population. See Interim Report of the Joint Legislative Committee on Reapportionment, Appendices "K", "M".

A plea for separate community recognition, similar to the complaint in the instant action, was made by Negro residents of the East Elmhurst community in Ince v. Rockefeller, 290 F. Supp. 878 (S.D.N.Y., 1968). Plaintiffs in the Ince case argued that the division of East Elmhurst into two separate assembly districts was a constitutional deprivation of the rights of the Negro residents of that community who assertedly shared a common racial, political and cultural background. In rejecting that contention

and in dismissing the complaint in the Ince case, District Judge Pollack stated (p. 883):

> "It is obvious that each of the 44 communities in Queens could not be treated as separate entities in the establishment of 16 equal assembly districts that Queens County was entitled to by virtue of its population. Pleas for separate community recognition, similar to those raised by plaintiffs here, were made by intervenors from Flatbush and Bay Ridge in contesting the recently enacted congressional districts in New York State. In rejecting their contentions, the three-judge Court in its unanimous opinion in Wells v. Rockefeller, 281 F. Supp. 821, 825 (S.D.N.Y., 1968) stated:
>
> 'The Legislature cannot be expected to satisfy, by its redistricting action, the personal political ambitions or the district preferences of all of our citizens. For everyone on the wrong side of the line, there may well be his counterpart on the right side. The twenty or more identifiable communities in Brooklyn may well have preserved their own traditions from the days of the Dutch, although in today's rapidly changing world, this is doubtful. But even Brooklyn's large population will not support twenty community congressmen. Of necessity, there must be lines which divide.'"

Plaintiffs apparently believe that the Ince case is distinguishable on the ground that the instant action involves a race-conscious approach by the State in the drawing of new district lines to satisfy the demands of the United States Department of Justice.

It is true that federal courts have rejected demands that district lines be drawn to ensure the success at the polls of racial groups in proportion to their percentage of the population. See, e.g. Whitcomb v. Chavis, 403 U.S. 124, 149-160 (1971); Mann v. Davis, 245 F. Supp. 241, 245 (E.D. Va.), affd. 382 U.S. 42 (1965); Kilgarlin v. Martin, 252 F. Supp. 404 (S.D. Tex., 1966), rev'd on other grounds 386 U.S. 120 (1967); Ferrell v. Oklahoma, 339 F. Supp. 73, 83 (W.D. Okla.), affd. 409 U.S. 939 (1972); Howard v. Adams County Board of Supervisors, 453 F. 2d 455 (5th Cir., 1972). However, none of the above cases that have been relied on by plaintiffs involved consideration of racial statistics by the State to comply with a directive of the United States Department of Justice pursuant to § 5 of the Voting Rights Act, 42 U.S.C. § 1973c to eliminate the alleged racially discriminatory effect of prior legislative district lines.

The fact that racial considerations are utilized by public officials does not necessarily involve unconstitutional behavior. On the contrary, in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971), the Supreme Court upheld the use of a pupil assignment plan based on the race of the students. See also

Wanner v. County School Board of Arlington County, 357 F. 2d 452 (4th Cir., 1966).

Consideration of race by public officials in promoting integrated housing has been sustained by this Circuit in Norwalk CORE v. Norwalk Redevelopment Agency, 395 F. 2d 920 (2nd Cir., 1968), and in Otero v. New York City Housing Authority, 484 F. 2d 1122 (2nd Cir., 1973).

Similarly, the use of racial quotas requiring preferential hiring of non-whites to overcome the past effects of racial discrimination in employment has been sustained. See Associated General Contractors v. Altshuler, 490 F. 2d 9 (1st Cir., 1973) and cases cited therein, cert. denied 42 U.S.L.W. 3594 (1974).

Thus, while the State of New York does not believe that the 1972 legislative and congressional redistricting statutes produced a racially discriminatory effect as charged by the Department of Justice in its ruling of April 1, 1974, it is unprecedented and unwarranted to charge the State with acting unconstitutionally in its efforts to satisfy the objections that were expressed by the Department of Justice in rejecting certain of the 1972 districtlines.

B.

In support of its motion for a preliminary injunction, plaintiffs argued that § 5 of the Voting Rights Act would authorize the District Court to enjoin the enforcement of the challenged State statutes. However, it is clear from the specific language of § 5 that only a three-judge court could enjoin a State statute that is subject to its provisions. Moreover, a § 5 injunction could only bar the enforcement of the statutes pending approval by the Department of Justice or by the District Court of the District of Columbia and could not serve as authority for invalidating a statute on constitutional grounds. Allen v. State Board of Elections, 393 U.S. 544 (1968).

At the time of the hearing on June 20, 1974 on plaintiffs' motion for a preliminary injunction, the challenged State statutes had already been submitted by the State of New York to the Department of Justice for approval pursuant to § 5 of the Voting Rights Act. Shortly after the date of the hearing, the Department of Justice on July 1, 1974 issued its determination that the Attorney General of the United States had no objection to the implementation of the submitted 1974 redistricting statutes. Accordingly, the District Court quite properly dismissed plaintiffs'

cause of action brought pursuant to the Voting Rights Act.

C.

In addition to failing to establish a constitutional or statutory deprivation of rights, plaintiffs' case presented to the Court below was fatally defective as an action in equity.

Even assuming arguendo that the complaint established a meritorious cause of action, a basic principle governing the exercise of equitable discretion requires a court to balance the relative hardships between the parties which would result in determining whether to issue an injunction and "to choose the course likely to cause the least injury." International Association of Machinists and Aerospace Workers v. Northeast Airlines, 473 F. 2d 549, 553 (1st Cir., 1972); Symington Wayne Corp. v. Dresser Industries, Inc., 383 F. 2d 840 (2nd Cir., 1967). Where the public interest will be adversely affected by the granting of an injunction which cannot be compensated by an injunction bond, courts of equity will, in all but the most unusual circumstances,

deny injunctive relief. Yakus v. United States, 321 U.S. 414, 440 (1944); Virginian Railway Company v. System Federation No. 40, 300 U.S. 515, 552 (1937).

Here, plaintiffs' chance for success was not only improbable, but any balancing of equities must weight heavily in the defendants' favor. At the time of the hearing before the District Court, the State of New York was already deep into the electoral processes for the holding of this year's primary and general elections. The first day for signing designating petitions for this year's primary election was on June 17 (Election Law, § 149-a, subd. 2). All designating petitions were required to be filed with the Board of Elections no later than July 15, 1974 (Election Law, § 149-a, subd. 4). The 1974 primary will be held on September 10th. Laws of 1974, Chapter 9. If the injunctive relief that plaintiffs seek were granted, there would not be sufficient time for the New York Legislature (which is not now in session) to enact a new districting statute, to submit it to the Department of Justice for approval pursuant to § 5 of the Voting Rights Act together with necessary supporting population statistics, and to obtain such approval in time for this year's primary election.

Moreover, a change in district lines at this time would work a substantial injustice to the candidates for public office in the affected areas who have already completed the arduous task of collecting the necessary signatures from registered voters in their districts to qualify for this year's primary and who have filed such signatures with the New York City Board of Elections. Nor would there be sufficient time for the New York City Board of Elections to establish new election districts in the affected areas if changes in legislative district lines were ordered prior to the date of this year's primary. Under these circumstances, it should be evident that injunctive relief must be denied to prevent the chaos that would prevent the holding of an orderly primary and general election this year in Kings County.

CONCLUSION

For the foregoing reasons, the order and judgment of the District Court denying plaintiffs' motions for a preliminary injunction and summary judgment and dismissing the complaint should be affirmed.

Dated: New York, New York
August 9, 1974

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants-Appellees
Malcolm Wilson, John Ghezzi,
Warren Anderson and Perry
Duryea, Jr.
Office & P.O. Address
Two World Trade Center
New York, N.Y. 10047
(212) 488-7413

GEORGE D. ZUCKERMAN
Assistant Attorney General,
Of Counsel.

CERTIFICATE OF SERVICE

I, GEORGE D. ZUCKERMAN, certify that on August 9, 1974 I served a copy of the brief for appellees Wilson, Ghezzi, Anderson and Duryea, upon counsel for the parties in this case by causing a copy thereof to be mailed with postage pre-paid to:

NATHAN LEWIN, ESQ.
Miller, Cassidy, LaRocca
& Lewin, Esqs.
1320-19th Street, N.W.
Washington, D.C.

DENNIS RAPPS, ESQ.
66 Court Street
Brooklyn, N.Y. 11201
Attorneys for Plaintiffs-
Appellants

HON. DAVID TRAGER, ESQ.
U.S. Attorney
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York

IRWIN HERZOG, ESQ.
Assistant Corporation Counsel
Municipal Building
New York, N.Y. 10007
Attorney for New York City
Board of Elections

MICHAEL SCADRON, ESQ.
Attorney
U.S. Department of
Justice
Washington, D.C. 20530
Attorney for Defendant
William Saxbe

ERIC SCHNAPPER, ESQ.
NAACP Legal Defense Fund
10 Columbus Circle
New York, N.Y. 10019
Attorney for Defendant-
Intervenors
NAACP Legal Defense Fund

George D. Zuckerman

GEORGE D. ZUCKERMAN
Assistant Attorney General